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TO RENDER JUSTICE: MODELS OF 'JUSTICE' IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia to prosecute serious violations of humanitarian law committed in the course of the Yugoslavian armed conflict. The Tribunal's first president, Antonio Cassese, stated that the primary mission of the Tribunal is 'to render justice'. This paper explores how the Tribunal understands this task of rendering justice. In particular, it examines the models of justice that the Tribunal uses in judging crimes against humanity, focusing upon cases of sexual violence. Crimes of sexual violence have been charged in half of these cases of crimes against humanity, and are currently an area of extensive and innovative doctrinal development. In these cases, the Tribunal utilises four models of justice as 'procedure', 'punishment', 'recognition', and 'reconciliation'. All four models share an understanding of 'justice' as the enforcement of an existing legal regime to resolve the trauma of social conflict. 'Justice' functions as a phantasy in the psychoanalytic sense of an imaginary scene that veils the impossibility of a legal resolution of the trauma of crimes against humanity. However, this phantasy also reiterates the original traumatic wrong. Humanitarian law therefore requires a new model of 'relational' justice that does not only reiterate the wrongful past, but that can also institute a just future. In this 'relational' model, humanitarian law can render justice by articulating a measure of legal norms of relationships to others as members of universal humanity.

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TO RENDER JUSTICE: MODELS OF 'JUSTICE' IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing', including for the acquisition and the holding of territory . . .

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.

U.N. Doc. S/RES/827 (1993)

In 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia ('the Tribunal') in response to serious violations of international humanitarian law committed in the course of the Yugoslavian conflict since 1991. A year later, its then president, Antonio Cassese, presented the first annual report of the Tribunal to the United Nations. In his Report, Cassese argued that the Tribunal was founded upon the Hegelian principle: '*fiat justitia ne pereat mundus* (let justice be done lest the world should perish)' (1994: 12). As Cassese suggests, the primary mission of the Tribunal is 'to render justice' (1994: 48). 'Justice' functions as the fundamental axiological category of the Tribunal as a legal institution. It serves as the ethical foundation of the Tribunal's judgements, and functions as their legitimating principle. How, then, does the jurisprudence of the Tribunal conceive this foundational category of 'justice'? And how does it recognize and understand the injustice it seeks to remedy? This paper explores the different conceptions of justice that the Tribunal develops in its jurisprudence. In particular, it examines the models of justice that the Tribunal utilizes in judging cases of crimes against humanity, focusing upon crimes of sexual violence

both because of the large numbers of cases in which these offences have been considered and the rapid and recent development of doctrine in this area. This paper first examines the jurisprudential significance and conception of sexual violence as a crime against humanity. It then considers the four models of justice as procedure, punishment, recognition and reconciliation that the Tribunal uses to redress the injustices of this crime.

A New Category of Justice: Sexual Violence as a Crime against Humanity

Sexual violence charged as a crime against humanity is an important and rapidly developing area of jurisprudence in contemporary humanitarian law, the body of international criminal law governing the conduct of armed conflict. Commonly understood to extend traditional notions of the crimes of war, the Tribunal has described the crime against humanity as a ‘new category of crime’ that was first recognised as ‘an independent juridical concept’ in 1945 by the Charter of the International Military Tribunal of Nuremberg.¹ Crimes against humanity are now considered beyond any doubt part of customary international law. Following customary law, Article 5 of the Statute of the Tribunal defines crimes against humanity as:

the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

¹ *The Prosecutor v. Tadic*, Case No. IT-94-I-T, Judgement, 1997, par. 618 (‘*Tadic*’). There is considerable debate as to whether the ‘crime against humanity’ was a new crime because of the principle of *nullum crimen, nulla poena sine lege* (‘no crime without law, no punishment without law’) (see Cassese (2003): 67-74).

The development of the substantive law of crimes against humanity by the Tribunal is particularly evident in the area of sexual violence. Traditionally neglected by international criminal law, charges of sexual violence have been considered in ten of the twenty-one completed trials of crimes against humanity heard by the Tribunal.² The Tribunal has handed down the first convictions of persecution and enslavement as crimes against humanity for acts of sexual violence and has heard the first case of crimes against humanity arising solely from charges of sexual violence.³ It has provided the first consideration of the substantive elements of rape as a crime against humanity and the first definition of the offence of sexual violence under humanitarian law.⁴

The Tribunal's doctrinal development of sexual violence as a crime against humanity has been extensive and important. For this reason, the jurisprudence of these cases represents a new and significant articulation of the Tribunal's models of justice. These cases are also notable for their recognition of sexual violence as a humanitarian crime. They all consider the gender-specific humanitarian crimes of the Yugoslavian conflict, which were described by the United Nations Security Council as the 'massive, organized and systematic detention and rape of women' (U.N. Doc. S/RES/827 (1993)). For this reason, these cases represent a new category of justice for victims of sexual violence in armed conflict.

2 It should be noted that in six of the ten crimes against humanity sexual violence cases, rape was not charged as separate offence but as an element of persecution, torture or inhumane acts. In four of these cases rape as a crime against humanity was considered as a separate charge: *The Prosecutor v. Kunarac and others*, Case No. IT-96-23-PT & IT-96-23/1-PT, Judgement, 2001, ('Kunarac'); *The Prosecutor v. Kvočka and others*, Case No. IT-98-30/1-A, Judgement, 2001 ('Kvočka'); *The Prosecutor v. Nikolic*, Case No. IT-94-2, Judgement, 2003, ('Nikolic'); and *The Prosecutor v. Cesic*, Case No. IT-95-10/1-S, Judgement, 2004 ('Cesic'). In the *Kvočka* and *Nikolic* cases, the charges of rape were subsequently dismissed as subsumed in the charge of persecution as a crime against humanity.

3 See *Kunarac* and *Kvočka*.

4 See *Kunarac* and *Kvočka*.

A New Category of Injustice: Sexual Violence as an Offence under Humanitarian Law

This new potential justice for victims of sexual violence in armed conflict rests upon the development of a new legal category of injustice: sexual violence as an offence under humanitarian law. However, there is no distinct crime of sexual violence under humanitarian law. Rather, if the requisite elements are met, then sexual violence offences are prosecuted under the subject-matter jurisdiction of the Tribunal set out in its Statute, namely, grave breaches of the Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). For example, in the *Kunarac* case the same acts were charged as torture under Article 5(f) and rape under Article 5(g).⁵ Convictions arising from this same criminal conduct were held to be permissible because as a crime against humanity ‘torture and rape each contain a materially distinct element not contained by the other’.⁶ For this reason, the jurisprudence of Tribunal understands sexual violence as a crime against humanity as being comprised of two parts. The first part is the offence of sexual violence. The second part focuses upon the violation of humanitarian law. For example, in *Kunarac*, the Tribunal treated the offence of rape as a crime against humanity as being comprised of two substantive parts: firstly, the offence of rape, and secondly, the crime against humanity - the committing of that act as part of an attack directed against a civilian population in the context of an armed conflict.

The jurisprudence of the Tribunal understands ‘sexual violence’ as a category of acts prohibited under humanitarian law. The leading case in this area, *Kvočka*, defines sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”.

5 *The Prosecutor v. Kunarac and others*, Case No. IT-96-23-PT, Amended Indictment, 1999, par. 5.6.

6 *The Prosecutor v. Kunarac and others*, Case No. IT-96-23-PT & IT-96-23/1-PT, Judgement, Appeals Chamber, 2002, par. 179 (*‘Kunarac Appeals Chamber Judgement’*).

Thus, sexual violence is broader than rape and includes such crimes as sexual slavery or molestation . . . sexual violence need not necessarily involve physical contact’.⁷ This category of prohibited acts ranges from forced nudity to the ‘gender related crimes’ recognised by the ICC Statute, such as rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.⁸ Rape as a crime against humanity is the only offence of sexual violence that is specified in the Tribunal’s Statute (Article 5(g)). However, the Statute does not set out the elements of the offence of rape under humanitarian law. In *Kunarac*, the Tribunal defined the elements of the offence as:

The *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim’.⁹

Following *Kunarac*, the Tribunal in the *Kvocka* decision described rape as ‘forced or coerced acts of sexual penetration’.¹⁰ Sexual penetration, then, marks the distinction between rape and other sexual violence offences.

7 *Kvocka*, par. 180. The *Kvocka* decision follows the model of rape as sexual violence that was developed by the International Criminal Tribunal for Rwanda in a case of rape as a crime against humanity, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 1998 (*‘Akayesu’*). *Kvocka* did not, however, follow the *Akayesu* ‘holistic’ definition of rape, but instead followed the ‘mechanistic’ definition of *Kunarac*. See Campbell (2003) for further discussion of these different definitions of rape as a crime against humanity.

8 *Kvocka*, par. 180.

9 *Kunarac*, par. 460.

10 *Kvocka*, par. 182.

The ‘Subject of Rights’ and ‘Universal Humanity’

The Subject of Rights

This model of sexual violence conceives the offence as a violation of physical and sexual integrity, which breaches the victim’s right to sexual autonomy. The Tribunal’s jurisprudence describes the criminal act as a violation of the integrity of the body and of the person, which can be seen in the descriptions of sexual violence as ‘violations of the sexual integrity of the victims’, and the ‘violation of the moral and physical integrity of the victims’.¹¹ These notions of physical and sexual integrity in turn rest upon a conception of a right to sexual autonomy. For this reason, the Tribunal’s jurisprudence characterises sexual violence as a violation of the right to sexual autonomy.¹² In this conception of sexual violence, violation of bodily and personal integrity breaches the victim’s right to autonomy, that is, the right to self-determination. The criminal act violates the ‘liberal ideal’ of ‘sexual autonomy’ because it negates the exercise of the free will of the person over her or his physical body (Lacey, 1998: 104).¹³ This negation of the autonomy ‘undermines the integrity of the personhood of the victim by denying their right of consent over that property which is most personally held: the body’ (Cahill, 2001: 170). For this reason, the consent of the victim becomes a crucial aspect of the substantive definition of the crime, as can be seen in the Tribunal’s emphasis upon the coercive, forced, or abusive context of sexual acts that indicates the vitiation of the ‘free will’ of the victim.¹⁴ Reflecting the major national jurisdictions from which the Tribunal draws these models of sexual assault, this modern

11 *Kunarac*, par. 553; *Cesic*, par. 35.

12 *Kunarac*, par. 441; *Kvočka*, par. 177.

13 The difficulties of this model of consent in relation to rape in armed conflict is evident in *Kunarac*, in which the Defence alleged that the young women complainants had consented to sexual and ‘emotional’ relationships (par. 644, 762). The Tribunal ultimately rejected these arguments. See also Buss (2002).

14 *Kvočka*, par. 182.

conception of sexual violence derives from liberal models of contractual sociality, in which adults agree to rules about the use of that property which is most personally held, the body.

This model of sexual violence assumes a nexus between the integrity of the body and of the self by defining autonomy of the person as the right to bodily self-determination. It understands the crime as a violation of the integrity and hence of the autonomy of the self. That self is defined as a subject of rights, namely, the subject that possesses the right to physical integrity of the body and to the sexual integrity of the person. The Tribunal's understanding of sexual violence as a crime against humanity therefore rests upon a conception of a fundamental violation of the right to bodily and subjective integrity. The Tribunal's jurisprudence conceives the offence of sexual violence as a violation of the fundamental human rights that constitute the person *as* a subject: their right to physical and subjective integrity.

Universal humanity

However, the criminalisation of sexual violence under humanitarian law does not derive from this breach of fundamental human rights. Humanitarian law does not recognise all breaches of human rights as crimes against humanity, nor do breaches of international human rights law necessarily attract criminal sanctions. Moreover, the case law of the Tribunal clearly distinguishes between these two bodies of law, characterising international human rights law as concerned with the protection of citizens from civil breaches of human rights by States, and humanitarian law as a penal regime concerned with the protection of victims of hostilities by regulating the conduct of

armed conflict.¹⁵ While the jurisprudence of the Tribunal understands the crime of sexual violence in relation to the rights of the individual, it does not conceive the substantive humanitarian crime in these terms. The additional elements of the humanitarian crime that give the offence of sexual violence the status of a crime against humanity under humanitarian law are: (1) ‘that the crimes were *related to the attack on a civilian population*’ and (2) ‘that the accused knew his crimes were *so related*’.¹⁶ For example, in the *Kunarac* case the Tribunal rejected the disingenuous contention of the Defence that the assault reflected an individual ‘sexual urge’ and was not therefore a crime against humanity. The Tribunal found that the rape was part of a systematic act of ‘hatred’ committed against a civilian population.¹⁷ This context of a systematic attack directed against a civilian population in the course of an armed conflict raises a sexual offence to the status of a serious violation of humanitarian law under the Tribunal’s Statute.¹⁸ It constitutes the ‘humanitarian’ elements of the crime that are distinct from a breach of civil rights or an offence under a national criminal code. For this reason, the Tribunal held that ‘[r]ape as a crime against humanity or a violation of the laws or customs of war requires proof of elements that are not included in national penal codes, such as attack upon any civilian population (in the case of the former) or the existence of an armed conflict (in the case of both)’.¹⁹

15 *Kunarac*, par. 470.

16 *The Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, Appeals Chamber, 1999, par. 271 (*‘Tadic Appeals Chamber Judgement’*).

17 *Kunarac*, par. 816. The Tribunal also rejected on appeal a similar argument in the *Kvočka* case, in which the Defendant argued on appeal that if ‘he committed sexual crimes “for his own pathetic gain”’ then his actions were for personal motives and did not establish the persecutory intent necessary for a conviction of a crime against humanity: *The Prosecutor v. Kvočka and others* (2005) Case No. IT-98-30/1-A, Judgement, Appeals Chamber 2005, par. 688-689 (*‘Kvočka Appeals Chamber Judgement’*).

18 *Kunarac*, par. 410. The Tribunal had held in earlier decision that ‘customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law’ *The Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995 (*‘Tadic Jurisdiction Decision’*).

19 *Kunarac Appeals Chamber Judgement*, par. 402.

For this reason, the Tribunal's jurisprudence describes the crime against humanity not as an individual wrong, but as a collective wrong. For example, the Tribunal held that in relation to crimes against humanity, 'the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population'.²⁰ Criminalization under humanitarian law does not derive from the wrongful breach of the rights of the individual. Rather, it derives from the wrongful act against the person *qua* human being, because it violates the principle of humanity that bars attacks upon civilians. Bassiouni traces the concept of crimes against humanity back to the Hague Convention of 1907, which established norms of conduct in armed conflict 'as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience' (1996: 589). The crime against humanity 'shocks the conscience of mankind and warrants the intervention of the international community' because of the violation of these norms and laws of universal humanity.²¹

Antonio Cassese argues that the category of crimes against humanity 'came to include all acts running contrary to those basic values that are, or should be, considered inherent in any human being (in the notion, "humanity" did not mean "mankind" or "human race" but "the quality" or concept of human being)' (2001: 249). In current jurisprudence, these acts violate the very concept of what it is to be a human being. For example, the Tribunal defines crimes against humanity as 'serious acts of violence which harm human beings by striking what is most

20 *Tadic*, par. 644.

21 *Tadic*, par. 653. That is, crimes against humanity are wrongs against universal practice ('the usages established among civilized peoples'); wrongs against universal legal principles ('the laws of humanity'); wrongs against universal norms ('the dictates of public conscience') and the wrong against humanity itself. See Meron (2000) for a discussion of the contemporary rearticulations of the Marten Clause.

essential to them: their life, liberty, physical welfare, health and or dignity'.²² These acts involve 'the dehumanisation of those they believed to be enemies', and attack 'the very identity – the very humanity – of the victim'.²³ These acts of the perpetrator refuse to recognise the victim as 'human', and therefore as a member of universal humanity.

Establishing offences of crimes against humanity is 'intended to safeguard basic human values by banning atrocities directed against human dignity'.²⁴ For this reason, the Tribunal's conception of a crime against humanity does not limit criminal conduct to the numerated acts of substantive humanitarian law. For example, Article 5(i) of the Statute of the Tribunal includes 'other inhumane acts' in its list of numerated offences that constitute crimes against humanity. This category 'was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition'.²⁵ In this way, humanitarian law looks to the axiological category of the principle of humanity that protects the human being to determine whether or not an act is inhumane. The inhumane act denies the humanity of the victim, and hence violates the notion of a universal humanity of persons. This axiological category, then, rests in turn upon a conception of a wrong against humanity itself.

The Tribunal's jurisprudence draws upon this foundational conception of universal humanity to characterise the crime as a collective action against 'humanity as a whole'.²⁶ For example, the

22 *The Prosecutor v. Erdemovic*, Case No. IT-96-22, Sentencing Judgement, Trial Chamber, 1996, par. 28 ('*Erdemovic*').

23 *The Prosecutor v. Kunarac and others*, Case No. IT-96-23-PT & IT-96-23/1-PT, Summary of Judgement, Transcript of Trial Proceedings, 22 February 2001, par. 6561; *The Prosecutor v. Kupreskic and others*, Case No. IT-95-16-T, Judgement, 2000, par. 752 ('*Kupreskic*').

24 *Kupreskic*, par. 547.

25 *Kupreskic*, par. 563.

26 *Tadic*, par. 73; *Tadic Appeals Chamber Judgement*, par. 28. This characterisation of crimes against humanity has been debated in the Tribunal's case law concerning whether a crime against humanity should be regarded as a more serious offence than war crimes.

Tribunal held that crimes against humanity ‘transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity’.²⁷ This understanding of crimes against humanity conceives each person as a member of ‘humanity as a whole’, a universal category of persons: humanity. For this reason, for the Tribunal these crimes address ‘the whole of mankind . . . [and affect] each and every member of mankind’.²⁸ This universal category of humanity is evident in the *Tadic* Sentencing Judgement, which described the crime against humanity as:

an attack on the legitimate interests which all states have in maintaining certain standards that are essential for the coexistence of all mankind . . . [it] is an attack on humanity at large in the sense that humanity at large cannot hold together without adherence to the standards in question.²⁹

The crime against humanity seeks to exclude its victim from the category of universal humanity, and thereby to negate humanity as such.

The Tribunal’s jurisprudence understands humanitarian law as representing the collective and absolute norms of the international community, understood not only as the community of states, but also as the community of all persons. The Tribunal contends that all persons must ‘respect the fundamental global norms of international criminal law’.³⁰ These norms of international humanitarian law ‘lay down obligations towards the international community as a whole, with the consequence that each and every member of the “legal interest” in their observance’.³¹ These

27 *Erdemovic*, par. 28.

28 *The Prosecutor v. Erdemovic*, Case No. IT-96-22, Judgement, Appeals Chamber, 1997, par. 20-21 (*‘Erdemovic Appeals Chamber Judgement’*).

29 *The Prosecutor v. Tadic*, Case No. IT-94-I-T, Judgement in Sentencing Appeals, Appeals Chamber, 2000, par. 40 (*‘Tadic Judgement in Sentencing Appeals’*).

30 *The Prosecutor v. Stakic*, IT-97-24-T, Sentencing Judgement, 2003, par. 902.

31 *Kupreskic*, par. 519.

legal norms have a “universal character” because of their “highly ethical and moral content”.³² Breaches of these legal norms are acts subject to ‘universal condemnation’ (Morris and Sharf, 1995: 79), because humanitarian law expresses the universal values of all humanity.

Costas Douzinas argues that currently ‘[h]uman rights construct humans. I am human because the other recognises me as human which, in institutional terms, means as a bearer of human rights’ (2000: 371). Similarly, the jurisprudence of the Tribunal also constructs ‘humans’. It understands the victim of sexual violence as a bearer of the human right to sexual autonomy. In this model, *sexual violence* as a crime against humanity violates this fundamental human right. However, the Tribunal’s jurisprudence of sexual violence as a crime against humanity conceives it as a violation of not only the subject of rights, but also as a violation of universal humanity. The jurisprudence of the Tribunal thus also constructs a ‘universal humanity’. In this model, sexual violence as *a crime against humanity* is an attack upon the person as a member of humanity, upon the universality of the human, and upon the universal community of ‘humanity’ itself. It conceives humanitarian law as the articulation of the universal values of humanity, and the crime against humanity as the violation of those norms.

The new category of justice - sexual violence as a crime against humanity – contains within it four related but distinct notions of injustice. The first is the injustice against the individual person, which derives from the violation of those fundamental human rights that define that person as human. The second injustice derives from the violation of universal values, the ‘principles of humanity’ that protect the person as human being. The third concerns violations of humanity as a whole, the universal community of persons. The fourth injustice is the violation of

32 *Tadic* Jurisdiction Decision, par. 57.

humanitarian law, that is, the laws of the international community which express the values of a universal humanity.

The Justice of the Law

How does the Tribunal seek to redress these injustices? How does it conceive of ‘justice’ in its determination of these cases? The jurisprudence of the Tribunal concerning sexual violence as a crime against humanity draws upon two classical juridical models of ‘justice’ as *procedure* and *punishment*, and two more recent models of justice as *recognition* and *reconciliation*.

1 The Justice of Procedure

The jurisprudence of the Tribunal understands justice as *procedural*, that is, as the institution of the ‘formal justice’ of the rule of law. This is a model of justice in the sense of the ‘regular and impartial administration of public rules’ (Rawls, 1999: 206). This notion of procedural justice is a founding precept of the jurisdiction of the Tribunal. For example, the *Tadic* Jurisdiction Decision held that the Tribunal was established by law because it was established ‘in accordance with the rule of law, [that is] the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments’.³³ This conception of justice as the impartial and consistent application of rules requires the just and fair enactment of law. This liberal model of procedural justice conceives law as a trial process that is ‘underpinned by principles of justice, fair trial and the protection of the fundamental rights of the individual’.³⁴

33 *Tadic* Jurisdiction Decision, par. 45.

34 *Erdemovic*, par. 21.

For this reason, '[t]he right to a fair trial is central to the rule of law: it upholds the due process of law'.³⁵ Justice enacts the law by applying law equally and fairly to all.

In this conception of procedural justice, the rule of law replaces the rule of power, and legal conflict replaces armed conflict. The Tribunal conceives procedural justice as a 'civilised' model of conflict that is governed by rules and 'standards of procedure and evidence that commend themselves to all civilised nations'.³⁶ According to this model, these 'rules (of evidence, procedure, and professional ethics) serve as "enabling constraints"' of the legal regulation of conflict (Osiel, 2001: 45-46). In this way, the legal regulation and ordering of social relations displaces violent social conflict. For this reason, the Tribunal refuses to hear arguments concerning the *tu quoque* defence of 'you did it, too', because the obligations of humanitarian law are absolute, and apply equally to all parties to the conflict regardless of the actions of each side.³⁷ In this model of justice, rational legal rules replace irrational conflict, and the rule of law displaces social violence.

2 *The Justice of Punishment*

The Tribunal's jurisprudence also deploys a second model of justice as *punishment*. This conception of punitive justice has two key strands: 'deterrence and retribution'. Deterrence is both specific (to deter the accused from reoffending) and general (to deter others from

³⁵ *Tadic Appeals Chamber Judgement*, par. 43.

³⁶ *The Prosecutor v. Kupreskic and others*, Case No. IT-95-16-T, Summary of Judgement, Appeals Chamber, Transcript of Trial Proceedings, October 2001, par. 944-946.

³⁷ *Kupreskic*, par. 510-520.

committing similar crimes).³⁸ Retribution ‘expresses society’s condemnation of the criminal act and of the person who committed it and imposes a punishment for what he or she has done’.³⁹ In this model, punitive justice enacts the authority of the law by following the maxim ‘*punitur quia peccatur* (the individual must be punished because he broke the law)’.⁴⁰ This justice enforces the law, and reinstitutes the legal order of the international community. The punishment of the crime restores law in a society that has not observed the legal rules governing the conduct of conflict.

Freud reminds us that what prevails in law ‘is no longer the violence of the individual, but that of the community’ (1985: 351). In this model of retribution, the violence of the individual’s crime invokes the normative element of the retribution of the international community. Punitive justice is normative because it condemns the act of the offender, such that retribution should not ‘be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes’.⁴¹ For example, the Tribunal found that ‘[o]ne of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as whole’.⁴² The Tribunal’s penalty ‘thus conveys the indignation of humanity for the serious violations of humanitarian law for which an accused was found guilty’.⁴³

According to this model of justice, ‘[p]unishment strongly affirms the rule of law and the norms that protect human rights’ (Hesse and Post, 1999: 15). It conceives crimes against humanity as

38 *Kunarac*, par. 838-839. There is considerable debate in the Tribunal’s jurisprudence as to the correct weight that should be given to deterrence or retribution in sentencing decisions.

39 *Cesic*, par. 23.

40 *The Prosecutor v Tadic*, IT-94-I-Tbis-R117, Sentencing Judgement, 1999, par. 7

41 *Kunarac*, par. 841.

42 *Erdemovic*, par. 64.

43 *Cesic*, par. 23.

breaching the collective norms of humanity, which punitive justice then reinstitutes in the form of international humanitarian law. In this model, justice reinscribes universal ethical norms. It replaces the particularism of ethnic violence with the universality of international legal norms. Punitive justice enforces the laws of the international community, which express the values of a universal humanity.

3 *Justice as Recognition*

The Tribunal also uses a third model of justice as *recognition* of the wrong to the victim. In this model to render justice is to recognise the harm of the crime to its victims and their relatives.⁴⁴ The Tribunal considers the experiences of the victims and witnesses relevant to the assessment of the gravity of the crime, because ‘appropriate consideration of those circumstances gives “a voice” to the suffering of the victims’.⁴⁵ For this reason, the consequence of the crime upon the victim who is injured by it is always directly relevant to sentencing.⁴⁶ In the Tribunal’s jurisprudence, humanitarian law recognises the harm to the victim as a human being.⁴⁷ The legal recognition of the injustice to the victim acknowledges the harm as a crime punishable by law, recognises its victim as a subject of rights, and restores the ‘humanity’ of the victim.

This model understands justice as the legal recognition of the harm of the crime to the victim. It conceives the prosecution of that harm before an international tribunal as an acknowledgement by the international community that the harm is ethically wrong and legally prohibited. That legal acknowledgement of the harm to the victim restores her or him to the status of a subject of rights,

⁴⁴ *Nikolic*, par. 4.

⁴⁵ *Kvocka*, par. 702; *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, 2001, par. 703.

⁴⁶ *The Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 2002, par. 512.

⁴⁷ *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, 2000, par. 787.

that is, to the status of a person who possesses fundamental human rights. By recognising the victim as entitled to protection *qua* human being, humanitarian law repudiates the perpetrator's denial of the humanity of victim. In all three forms of legal recognition, the acknowledgement of the harm to the victim by humanitarian law 'would restore the equilibrium so severely disturbed by such atrocious crimes' (Neier, 1999: 49).

4 *Justice as Reconciliation*

The Tribunal's fourth model of justice as *reconciliation* conceives justice as changing not only the individual victim, but also as changing the traumatised society itself (Ignatieff, 1999: 313). The jurisprudence of the Tribunal characterises 'peace-building and reconciliation among the affected communities [as] an integral part of the mission of this Tribunal'.⁴⁸ This jurisprudence links the 'truth-finding function' of the Tribunal to the task of 'furthering reconciliation in the former Yugoslavia'.⁴⁹ In the Tribunal's jurisprudence, '[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process'.⁵⁰ Operating similarly to truth and reconciliation commissions, the 'healing process' of reconciliation involves establishing an accurate historical record of the conflict. However, the judicial function of the Tribunal that assigns individual criminal responsibility, accountability, and punishment is also seen as a crucial

48 *The Prosecutor v. Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 2003, par. 66.

49 *The Prosecutor v. Sikirica and others*, Case No. IT-95-8, Sentencing Judgement, 2001, par. 149; *The Prosecutor v. Plavsic*, IT-00-39&40/1, Sentencing Judgement, 2003, par. 73 ('*Plavsic*').

50 *The Prosecutor v. Babić*, Case No. IT-03-72-S, Sentencing Judgement, Trial Chamber, 2004, par. 68-69.

element of this reconstructive task.⁵¹ For the Tribunal, ‘justice [is] of paramount importance for the restoration and maintenance of peace’.⁵²

In this model, criminal justice functions as a therapeutic process, where the horror is told, and the perpetrator is judged and punished. It understands the judgement and punishment of individuals as preventing the emergence of ‘the primitive and archaic concept’ of ‘collective responsibility’, which leads to further violence (Cassese, 1994: 16). In this model, the function of criminal justice is to provide a cathartic resolution of a traumatic violence so that the reconstruction of ‘social connection’ is possible (Oseil, 2000: 291). This resolution works through the affect of the victim, perpetrator, and communities that have been traumatised by social violence. This model figures justice as a collective act of memory that can represent collective trauma, recreate social solidarity, and reconstitute a traumatised society. This is a model of justice as therapy.

In the Tribunal’s jurisprudence, the two classical juridical models of justice as procedure and punishment emphasise the injustice of the violation of universal law and values. They seek to redress those injustices by the reinstitution and enforcement of the laws of the international community. In the procedural model the rule of law replaces social conflict, while the punitive model enforces global legal norms. The more recent models of justice as recognition and reconciliation emphasise the violation of the person and of community. These models seek to redress those injustices by the legal recognition of the victim and the legal reconciliation of violent social conflict. In the recognition model, humanitarian law recognises the victim as a human being, while in the reconciliation model law reconstructs warring groups as peaceful

⁵¹ *Plasvic*, par. 66-80.

⁵² *Nikolic*, par. 4.

communities. Each of these four models shares an understanding of justice as the legal suture of the breach of individual rights and the violation of universal humanity. Each of these models of justice assumes that law institutes justice, and that the institution of legal justice can suture the violation of the person and of universal humanity in crimes against humanity. In this way, the Tribunal's jurisprudence utilises models of justice that conceive it as the *legal* resolution of injustice.

The Justice of the Law

If to render justice is to provide legal redress for injustice, then the law will seek to redress the crime and its injustice to the victim. In law, 'the prosecution would speak on behalf of the victims, and the judges would do justice for them' (Neier 1999: 49). It will always acknowledge their suffering, prove the perpetrator's guilt, and deliver punishment. However, the law does not always offer justice to the victim. An example of this failure to offer justice to victims can be seen in the *Kvočka* decision, in which the Trial Chamber held that it had 'no difficulty believing that this witness has suffered a terrible and traumatizing ordeal. However, her testimony was so confused as to the details of the rape that it cannot be relied upon to establish guilt'.⁵³ In this case, (as in others), the Tribunal found that the victim had suffered an injustice, but that it could not offer her redress.

The possibility that the Tribunal may not offer justice to the victim is an integral part of the judicial process of judgement. The criminal trial must offer justice to the accused as well as the

53 *Kvočka*, par. 557.

victim.⁵⁴ Justice for the accused entails that an innocent person should not be convicted of crimes they did not commit, judged according to particular legal standards. For this reason, the Tribunal may refuse to take an indictment to trial, or at trial may not accept the evidence of a victim, or find the accused not guilty beyond reasonable doubt. The procedural justice of the fair trial requires that the Tribunal impartially judges the evidence for indictment, the persuasiveness of the witness, and the guilt of the accused.

In cases of sexual violence as a crime against humanity in particular, it is necessary to distinguish between the institution of particular law and the institution of universal justice. While universal justice as an absolute value may function as the axiological foundation for the Tribunal's judgements, those judgments institute the particular justices of law in a specific social and historical context. For example, in sexual assault cases before the Tribunal evidential issues have been particularly contentious, and typically concern conflict between the rights of the accused to a fair trial and the rights of witnesses to equality before the law, as exemplified by the *Tadic* Protective Measures Decision.⁵⁵ In such cases, the Tribunal balances the justice of procedure for the accused and the justice of recognition of the wrong to the victim. Moreover, the Tribunal's judgement is not a neutral determination upon the just balance of each claim, since social and political contexts inform the Tribunal's judgement upon 'justice'. For example, Chinkin points out that conventional 'fair trial' requirements rest upon 'human rights standards [that] have been defined by men in accordance with male assertions of what constitutes the most fundamental guarantees required by individuals' (1997: 78). Similarly, inequitable notions of gender inform models of witnessing, testimony, and evidence in leading sexual assault cases before the Tribunal

⁵⁴ *Nikolic*, par. 4.

⁵⁵ *The Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 1995. On this issue, see the exchange between Leigh (1996), (1997) and Chinkin (1997) on witness anonymity in the *Tadic* case.

(Campbell, 2002).⁵⁶ We cannot assume that humanitarian law can or will institute justice for victims of sexual violence.⁵⁷

Even if in all cases the ‘judges would do justice’ for the victims as Neier claims, it does not necessarily follow that it is possible for them to do so. The Tribunal can offer only a limited justice. Carla Del Ponte, the Prosecutor of the Tribunal, acknowledges that ‘[w]e are simply unable to investigate each and every case of torture, rape, or even murder. There are too many victims and too many criminals’ (2003). Even if the Tribunal were able to hear all cases of criminal conduct, its remedies are limited. The Tribunal is a criminal, not a civil, court and therefore its focus ‘has been on punishing the wrongdoers, not on providing compensation and support to those who have suffered’ (Charlesworth and Chinkin, 2000: 334). For example, the Tribunal does not offer reparative justice, which seeks to remedy the wrong done to the victim. Compensation is not within the jurisdiction of the Tribunal, and the complainant must pursue this remedy in national courts. The Tribunal does not offer restitutionary justice that aims to restore the injured party to its prior position before harm.⁵⁸ It is necessary to ask what form of redress or remedy could render justice in the case of sexual violence as an instrument of ‘ethnic cleansing’? After the destruction of identity, family and community, what could constitute justice? What could institute justice in the face of crimes against humanity itself?

56 While the Tribunal’s decisions concerning evidential issues have often been progressive, the legal reasoning which has led to these decisions is often not, in that this reasoning relies upon inequitable notions of gender.

57 ‘Politics’ in the more conventional sense of political government, parties and institutions also informs the Tribunal’s institution of justice. For example, Philippe Sands describes the situation in the village of Vukovar in the former Yugoslavia, in which ‘an understanding had been reached between the UN/EU and departing Serbian forces, apparently to the effect that only a limited number of persons suspected of international crimes . . . would be prosecuted before local courts . . . to obtain the voluntary departure of Serbian forces’ (2003: 105-6).

58 See Rules 105 and 106 of The Rules of Procedure and Evidence of the Tribunal. The Tribunal offers restitution in the narrow and technical sense of the restitution of property. However, even in this restricted sense the Tribunal itself does not enforce such orders. For further discussion of the issue of compensation and restitution in relation to rape as a crime under international humanitarian law, see Dixon (2002).

The Trauma of Justice

In the Closing Argument in the *Kunarac* trial, the Prosecutor acknowledged that ‘it can be said that no sentence this Court can possibly devise will adequately deal with the injustices that the victims suffered at the hands of these men. Yet the International Community will expect that not only will justice be done, but that it will also be seen to be done’.⁵⁹ This formulation of *injustice* reveals the fundamental paradox within the Tribunal’s conception of justice as the institution of law, namely, that humanitarian law institutes justice and yet injustice remains. Justice must be done, and yet it cannot be done because law cannot redress the injustice of a crime against humanity. Law must institute justice, and yet no legal justice can redress the overwhelming injustice of the crime.

That the law fails to enact justice is not simply an empirical problem, in the sense that certain actions could remedy this failure. Rather, it reflects a logical paradox in the Tribunal’s account of the relationship between law and justice. Derrida describes this logical knot in terms of the relationship between calculable law and incalculable justice: ‘[l]aw is the element of calculation, and it is just that there should be law, but justice is incalculable, it requires us to calculate with the incalculable’ (1992: 16). Humanitarian law faces the incalculability of justice, for it is not possible to legally calculate the just redress for the incalculable injustice of the destruction of particular and irreplaceable persons, families, and communities in crimes against humanity. In Derridean terms, the incalculability of justice founds its logical impossibility, since ‘justice would be the experience we are not able to experience . . . Justice is an experience of the

⁵⁹ *The Prosecutor v. Kunarac and others*, Case No. IT-96-23-PT & IT-96-23/1-PT, Prosecutor’s Closing Argument, Transcript of Trial Proceedings, 20 November 2000, par. 6330 (‘*Kunarac* Prosecutor’s Closing Argument’).

impossible' (Derrida, 1992: 16). Justice is impossible because it is beyond the limits of determinate humanitarian law. Humanitarian law can only institute legal justice, justice as determined by its particular legal calculation of injustice. Justice as such will always exceed the determinate legal calculation of the just. For this reason, the Tribunal's model of justice figures 'justice' as that which must exist 'outside' the calculability of the determinate legal order of humanitarian law (see figure 1 below):

|-----calculable law-----| **incalculable justice**

Figure 1

The Tribunal's model of justice

However, this figuration of justice has a symbolic structure that represents or articulates a particular relationship between humanitarian law and justice. In this representation of justice, incalculable justice, justice as such, is 'outside' the determinate legal order of calculable law. This figuration of justice represents it as an event that is impossible to represent 'in the symbolic order which founds interhuman relations, and which is called the law' (Lacan, 1953: 197). This figuration of justice thus gives it the same symbolic structure as trauma in the Lacanian sense. For Lacan, an event becomes traumatic if it is not possible to represent or symbolise it with an existing symbolic order. Trauma is the interruption of the 'automatic self-reiteration of the symbolic order's regular functioning, the moment when it *happens to fail*, where some purely contingent irruption derails its normative operations with something *stricto sensu* impossible' (Reinhard, 1999: 15). Reworking de Saussure's account of language and Lévi-Strauss's account of kinship, Lacan argues that meaning emerges from a differential relationship between symbolic elements, or signifiers. These signifiers exist in a structural relationship to each other – the

symbolic order – that symbolises or represents a social order. An event that is impossible to represent cannot be assimilated within existing symbolic structures (Lacan, 1969: 143). It becomes an experience of the impossible, because it is not possible to represent that experience within the existing symbolic order (Lacan, 1953: 190). For this reason, the traumatic event appears as a gap or a lack in the symbolic order. Figure 2 shows the symbolic structure of this trauma. The traumatic event is not symbolised, in that there is no signifier that represents it. For this reason, the signifier (S) and the traumatic event are barred or struck-through in the diagram. Because there is no symbolic element to represent it, the traumatic event appears as a lack in the symbolic order, the signifying chain of symbolic elements (S-S-S-S).

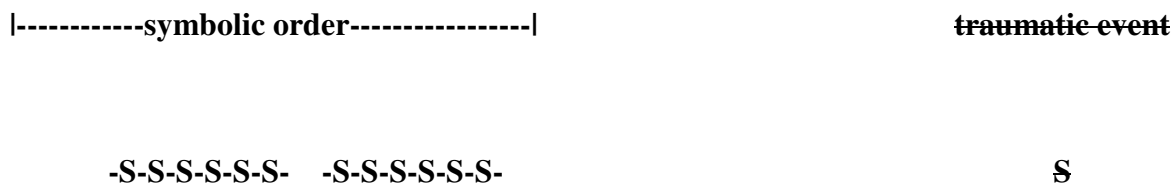


Figure 2

The Lacanian model of trauma

This Lacanian conception of trauma permits us to understand the logic of the Tribunal's conception of the justice of law. All four of the Tribunal's models of justice conceive law as suturing the traumatic event of the crime against humanity. In this figuration of justice, law constructs the person *qua* human and their relationship to others *qua* universal humanity. Positive humanitarian law symbolises what it is to be a person - the subject of rights - and what it is to be a member of the universal community of persons - universal humanity. In this way, the Tribunal's jurisprudence conceives humanitarian law as a symbolic order that founds 'interhuman' relations.

However, this model also understands the crime against humanity as a fundamental breach of the law's representation of the human and of universal humanity. The crime against humanity violates both the individual – a subject of rights - and the collective – a universal humanity. In this model, the crime against humanity is 'outside' that representation of the human and of universal humanity. It is what violates the conceptions of the person and universal community that found the existing legal order. The paradox of this model of the humanitarian crime is that humanitarian law constitutes a particular injustice as crimes against humanity, while also producing that injustice as its traumatic violation. As figure 3 below shows, the injustice breaches the subject of rights and of universal humanity that positive humanitarian law symbolises. However, positive humanitarian law cannot symbolise this injustice, because that injustice is a violation of its legal order. For this reason, the symbolic order of humanitarian law cannot assimilate or integrate the injustice within its existing symbolic structures other than as a violation of its legal order. The injustice is not symbolised, and for this reason appears as barred or struck-through in figure 3.

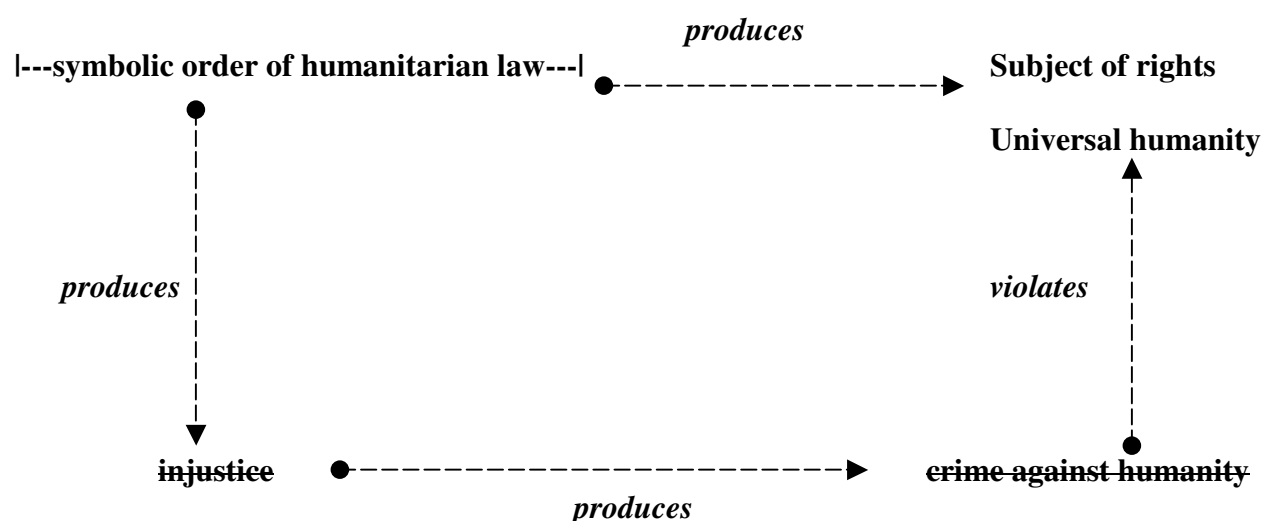


Figure 3
The Tribunal's model of the humanitarian crime

Humanitarian law constitutes the injustice as a crime because it breaches the symbolic order of the law, and yet that very breach structures the injustice as that which is ‘outside or beyond’ the law. The injustice is impossible to integrate within the symbolic order of the law, because the law cannot symbolise it. This formulation of crimes against humanity is illustrated by Justice Abi-Saab’s argument in the *Tadic* Jurisdiction Decision:

[t]he crimes constituting the serious violations of international humanitarian law for the prosecution of which, according to Article 1 of the Statute, the Tribunal was established . . . are all of relatively recent origin going back to the immediate aftermath of the Second World War. They were part of the cathartic reaction of the international community to the traumas of the untold horrors committed during that war.⁶⁰

The paradox of this conception of the relationship between injustice and justice is that the traumatic violation of the law demands the institution of the justice of law. It understands injustice as the violation of law, and the violation of law as inaugurating legal justice. For this reason, the Tribunal’s models of justice assume that law institutes justice, and that the institution of legal justice can suture the violation of the person and of universal humanity in crimes against humanity. Justice thus becomes the *legal* resolution of the injustice that breaches the existing legal order of humanitarian law.

However, humanitarian law cannot institute justice. For the Tribunal, justice is that which predicates the symbolic order of humanitarian law *and* that which it cannot enact. For the contemporary law of crimes against humanity, the trauma of justice is its juridical impossibility. Justice appears as a gap or a lack in the symbolic order of humanitarian law. If justice is an experience of the impossible, it is because humanitarian law cannot symbolise it within its

60 *The Prosecutor v. Tadic*, Case No. IT-94-I-T, Separate Opinion Of Judge Abi-Saab On The Defence Motion For Interlocutory Appeal On Jurisdiction, 1995, at I.

symbolic order. For this reason, justice is the trauma of humanitarian law and hence the Tribunal's notion of the justice of law has the symbolic structure of trauma.

The Tribunal's conception of justice as the legal suture of the trauma of crimes against humanity functions as a 'phantasy' in the psychoanalytic sense of an '[i]maginary scene in which the subject is a protagonist, representing the fulfilment of a wish . . . in a manner which is distorted . . . by defensive processes' (Laplanche and Pontalis, 1973: 314). It is not a fantasy in the common sense meaning of an unrealistic and delusionary daydream of justice, or a misrecognition of the reality of injustice. Rather, Lacan reminds us that 'phantasy is never anything more than the screen that conceals something quite primary', the lack or gap in the symbolic order (1964: 60). The Tribunal's notion of justice conceals its traumatic structure with a fundamental phantasy of the legal resolution of the subjective and collective trauma of sexual violence as a crime against humanity. 'Justice' functions as a phantasmatic suture because it covers over the fundamental breach of the symbolic order of humanitarian law, namely, the traumatic crime against humanity. This fundamental phantasy of justice functions as a defence against the impossibility of law instituting justice. The phantasy of justice represents the fulfilment of a wish, that wish being that law *could* institute justice. In this imaginary scene, the law can suture the trauma of the crime against humanity. In the way, the phantasy of justice serves as the ultimate support of humanitarian law. As figure 4 below illustrates, the phantasy of justice conceals the impossibility of justice. The phantasy of justice veils the impossibility of justice for the injustice of the crime against humanity. For this reason, the unsymbolised injustice appears as a lack in the symbolic order of the law in Figure 4.

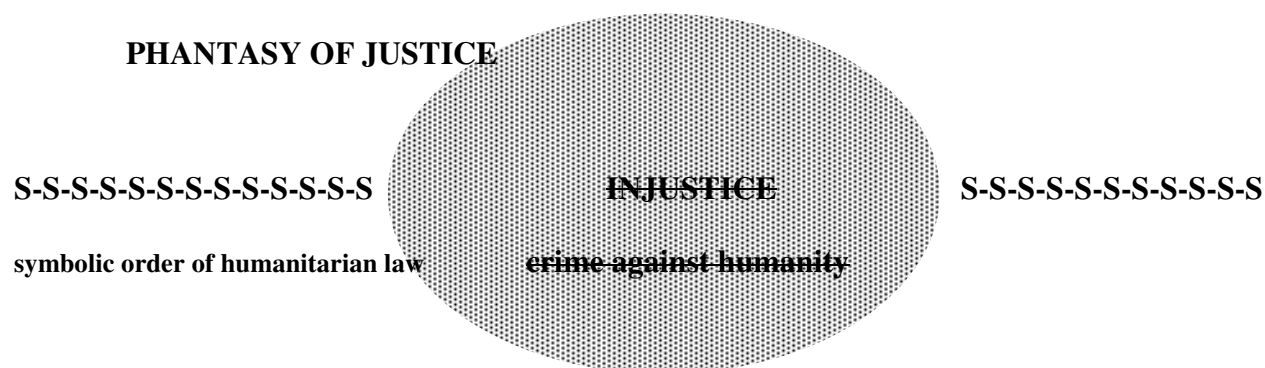


Figure 4

The phantasy of justice

However, this fundamental phantasy of justice ‘tells the story of a traumatic event that “continues to not to take place”, that cannot be inscribed into the very symbolic space it brought about by its intervention’ (Zizek, 2000: 64). The Tribunal’s understanding of justice as the repair of the violation of the symbolic order of law becomes a form of repetition of that trauma. In phantasy we ‘repeat the traumatic situation in a compulsive fashion . . . as a way of trying to bind it’ (Laplanche and Pontalis, 1973: 470). The juridical becomes a symptomatic expression of the traumatic by repeating it in the same symbolic structure. Humanitarian law repeats the very terms of the trauma that inaugurates it: the violation of the subject of rights and of universal humanity. In this way, the trauma persists *in* humanitarian law.

This repetition of the originary trauma of the crime against humanity can be seen in the two leading cases decided by the Tribunal concerning rape as a crime against humanity. In *Kunarac* the Tribunal describes how the three Serb soldiers on trial ‘mistreated Muslim girls and women . . . *because* they were Muslims. They therefore fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of and had

the effect of perpetuating the attack against the Muslim civilian population'.⁶¹ Similarly, in the *Kvocka* case, the Defendant argued on appeal that the acts of sexual violence charged 'do not involve discrimination based on religion, ethnicity, or political belief' because they were committed for personal rather than persecutory motives. The Appeal Chamber rejected this argument on the grounds that the 'sexual violence was directed only against women of non-Serb origin'.⁶²

However, Vesna Nikolic-Ristanovic argues that this understanding of sexual violence conceives it 'as a crime against a particular community, against women as a form of male property, and not as a crime against the female body, against the woman as an individual' (2000: 79). This conception of sexual violence cannot acknowledge those sexual assaults that were part of systematic attacks on civilians but which were 'outside' ethnic categories of identity. This analysis helps reveal the repetition in the Tribunal's phantasmic conception of humanitarian justice. The Tribunal's conception of justice as the institution of law repeats the traumatic event of the 'ethnicity-based aggression of the Serbs against the Muslim civilians' because it reiterates the racialised terms of the attack upon civilians. This understanding of sexual violence as a crime against humanity conceives it in terms of a systematic attack against the *Muslim* civilian population or the persecution of women *of non-Serb origin*. To understand sexual violence as a crime against humanity in this way is to reiterate the very categories of identity which ethnic cleansing sought to constitute and fix.⁶³

61 *Kunarac*, par. 592.

62 *Kvocka* Appeals Chamber Judgement, par. 369-370.

63 I am indebted to Mark Cousins (2000) for this argument, put forward in his discussion of Jewish identity and the Holocaust.

This failure to recognise sexual violence other than in terms of the racialised constructions of gender of this armed conflict can also be seen in the form of charges of sexual violence considered by the Tribunal. Vesna Kesic argues that because ‘war rapes and other forms of violence against women were so tightly enmeshed within the categories of nation and ethnicity, they could only be recognized as a war strategy . . . only if they occurred in large numbers (whatever “large” means), if they were “systematic” and “followed a pattern,” and if they supported the claim of genocide or ethnic cleansing’ (2002: 317). The enmeshing of violence against women in these categories of nation and ethnicity is particularly evident in relation to rape charges considered by the Tribunal. In the majority of crimes against humanity cases, rape is not charged separately as a crime against humanity (under Article 5(g) of the Statute). Instead, in these cases it is charged as persecution, torture, or inhumane acts as crimes against humanity (under Article 5(f), Article 5(h), or Article 5(i) of the Statute). In this way, rape is considered where it supports other charges of crimes against humanity, such that it is subsumed in other offences such as persecution (see *Kvocka* and *Nicolic*), or alternatively, it is not charged at all but is considered as evidence as elements of these crimes. The Tribunal’s cases of crimes against humanity thus reiterate the original injustice of the violence of the ethnic conflict in the former Yugoslavia by constituting violence against women in terms of its categories of nation and ethnicity.

This phantasmic conception of justice determines and fixes humanitarian law in an imaginary scene. It structures the justice of law in relation to its traumatic violation: the crime against humanity. The fundamental fantasy of justice veils the lack in humanitarian law, that is, it veils the impossibility of legal justice redressing the injustice of the crime against humanity. However, it also sustains and reiterates that lack of justice in humanitarian law. The Lacanian notion of

‘[t]rauma implies fixation or blockage. Fixation always involves something which is not symbolised’ (Fink, 1995: 26). This phantasy of the justice of the law symptomatically repeats the traumatic event that is not symbolised. To understand justice as the institution of the existing order of law entails that it functions as a symptomatic repetition of its originary trauma. For this reason, humanitarian law requires a new model of international justice that does not understand it as the legal resolution of subjective and social trauma. That understanding of international justice figures it as traumatic because determinate humanitarian law suffers the trauma of the impossibility of justice and thereby structures ‘justice’ as the traumatic repetition of *injustice*.

The Future Justice of Law

The fundamental phantasy of humanitarian law is that the enforcement of the existing legal order will suture the trauma of crimes against humanity. However, that phantasy also reiterates that trauma, repeating the very violation of law that humanitarian justice seeks to redress. Humanitarian law should therefore traverse the fundamental phantasy of legal justice that sustains it as an existing legal order. Traversing this fundamental phantasy of humanitarian law requires a reconfiguration and reconstruction of the relationship of humanitarian law to its traumatic lack, that is, that humanitarian law cannot provide justice. In Lacanian terms, to traverse a fantasy is to ‘re *present* . . . something that is fundamentally missing from the past [by] restoring it as lacking’ (Reinhard, 1999: 9). The phantasy of justice refuses to acknowledge the lack of law. Stover and Weinstein point out that ‘[w]e pursue justice because we wish to be vindicated, and more importantly, to have what we have lost returned’ (2004: 10). However, humanitarian law must acknowledge that it cannot return what was lost. Humanitarian law must re-present its own lack and ‘go through’ the phantasy that its enforcement sutures the violation of

its legal order. Traversing this phantasy requires a model of humanitarian justice that acknowledges its lack of justice. It requires an acknowledgement of the limits of humanitarian law to redress injustice, and hence of the impossibility of the phantasy of the justice of law that sustains it as a positive legal order. By traversing that phantasy, it becomes possible to re-present the lack of justice of humanitarian law. That re-representation involves acknowledging the limits of legal justice to redress the injustice of crimes against humanity.

In Lacanian theory, to traverse the fundamental phantasy involves identification with the symptom, '*with the object-cause of its desire*' (Reinhard, 1999: 18). Analogously, humanitarian law should identify with the object-cause of its desire – justice. This identification with justice, rather than with law, requires a different understanding of the relationship between humanitarian law and justice. It permits humanitarian law to shift from understanding justice as the enforcement of the existing legal order to conceiving justice as the institution of just social relations. In this reorientation of the relationship between law and justice, the existing positive law does not determine justice. Rather, justice should determine positive law. For this reason, humanitarian justice requires understanding legal justice not as the repetition of the crimes of the past but also as the institution of future social bonds. Rather than reiterating existing gendered and racialised notions of persons and relations between them, humanitarian law should symbolise changing social relations to others. Such a model requires understanding humanitarian justice not only as seeking to redress the wrongs of the past by enforcement existing humanitarian law. Rather, it understands humanitarian law as also seeking to represent those injustices in terms of a just social future.

To represent the injustice of sexual violence in terms of a just social future requires changing the existing legal order. Given that the existing law represents that injustice as its violation, and that this representation reiterates the original injustice in its phantasy of justice, then it is necessary to reconsider how that substantive law articulates injustice. Lacan argues that to symbolise trauma requires a rearticulation of the symbolic order of the law, since trauma marks that which it cannot represent within its existing symbolic structure (1953: 283). To symbolise the injustices that constitute crimes against humanity requires a reconfiguration of the existing symbolic structure of the positive legal order of humanitarian law. To reconfigure the existing positive humanitarian law requires a new model of injustice for humanitarian law. For example, rather than reiterating the ethnic categories of the Yugoslavian conflict in its definition of sexual violence, humanitarian law should recognise sexual violence as one of the numerated acts constituting a crime against humanity. More generally, sexual violence should be recognised as a distinct and separate offence under humanitarian law. This recognition of a separate humanitarian crime of sexual violence would enable the systematic sexual violence of the Yugoslavian conflict, and indeed many other conflicts, to be recognised in their own right as harms to the person.

However, crimes against humanity do not simply represent harms of the individual person, but also to the collective category of universal humanity. If crimes against humanity address the whole of mankind and affect each and every member of mankind, it is because the crime does not recognise another as a member of universal humanity. The criminality of these acts derives from their negation of the relationships between persons as humans. Their injustice concerns violations of humanity itself, a violation of the minimum standards of conduct necessary to sustain relationships between persons as humans. This crime profoundly disrupts the fundamental social bonds of all humanity, because it violates the very foundation of those

relations, universal humanity. This concept of ‘universal humanity’ is therefore a relational notion, in which each person exists in relation to another because they are members of a universal category of persons: humanity. This relational conception of universal humanity suggests another way to understand the role of humanitarian law.

Humanitarian law cannot redress the injustices of crimes against humanity for its victims nor can it reconstitute a society destroyed by those injustices. It can, however, represent or symbolise norms of conduct necessary to sustain an ongoing relationship between persons as humans. These norms ‘are essential for the coexistence of all mankind . . . humanity at large cannot hold together without adherence to the standards in question’.⁶⁴ In this relational model, the function of humanitarian law is to symbolise the social relationships between persons as members of the universal community of humanity. For this reason, this model conceives humanitarian law as setting out minimum norms of conduct necessary to sustain relations between persons as members of universal humanity. In this model, humanitarian law symbolises the norms of the relationship between all human persons. Humanitarian law thus represents those standards of conduct necessary to sustain the universal social bond between all persons as members of humanity.

This relational model understands humanitarian law as the reconstruction of the symbolic tie of law between persons, in which that symbolic tie expresses the universal social bond between persons. In this model, humanitarian law is the legal representation of fundamental social bonds between all persons, the universal relationship between persons *qua* human. Humanitarian law gives that social bond its symbolic form, and thereby mediates the universal social relation

⁶⁴ *Tadic* Judgement in Sentencing Appeals, par. 40.

(Goodrich 1998). In this model, the crime against humanity breaches these symbolic universal relations. It understands humanitarian law as reconstructing those symbolic ties between persons by its articulation of universal social bonds. This representation of universal social bonds is performative in the Austinian sense. Humanitarian law creates the object it names, the universal social bond, and its legal institutions instantiate this representation of the social bonds between all persons in its procedures and judgements. This relational model understands humanitarian law as both establishing a framework within which to adjudicate the breach of the social bonds of universal humanity and as symbolizing new forms of social bonds between persons as members of the collective and universal category of humanity.

The relational model thus conceives humanitarian law as having two functions. The first is symbolic. In this model, humanitarian law represents the social bonds between persons. The second function is normative. Humanitarian law represents the norms of conduct necessary to sustain universal social bonds between persons. This normative function is futural, as its orientation is to a future just social order. This relational model of humanitarian law considers justice as ‘the very dimension of events to come’ and hence as requiring ‘the transformation, the recasting or refounding of law and politics’ (Derrida, 1992: 27). The relational model of humanitarian law outlined here assigns it a limited but important part in establishing future just social relations. However, it also requires a recasting of current humanitarian law and existing legal institutions, and a refounding of humanitarian law through the development of new categories, principles, and practices. The immediacy of this task is exemplified by the testimony of Witness AS appearing in the *Kunarac* case: ‘Even though she was still visibly frightened

when she was here testifying, she explained why she did come forward. She said, “Because of my future””.⁶⁵

⁶⁵ *Kumarac* Prosecutor’s Closing Argument, par. 6270.

REFERENCES

- Bassiouni, Cherif M. with Peter Manikas (1996) *The Law of the International Criminal Tribunal for the Former Yugoslavia*. New York: Transnational.
- Buss, Doris (2002) 'Prosecuting Mass Rape: *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*', *Feminist Legal Studies* 10: 91-99.
- Cahill, Ann (2001) *Rethinking Rape*. Ithaca and London: Cornell University Press.
- Campbell, Kirsten (2002) 'Legal Memories: Sexual Assault, Memory and International Humanitarian Law', *Signs: Journal of Women in Culture and Society* 28(1): 149-178.
- Campbell, Kirsten (2003) 'Rape as a "Crime Against Humanity"', *Journal of Human Rights* 2(4): 507-515.
- Cassese, Antonio (1994) *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, A/49/324, S/1994/1007.
- Cassese, Antonio (2001) *International Law*. Oxford: Oxford University Press.
- Cassese, Antonio (2003) *International Criminal Law*. Oxford: Oxford University Press.
- Charlesworth, Hilary and Christine Chinkin (2000) *The Boundaries of International Law: A Feminist Analysis*. Manchester: Manchester University Press.
- Chinkin, Christine (1997) 'Due Process and Witness Anonymity', *American Journal of International Law* 91: 75-79.
- Cousins, Mark (2000) 'Closing Address', paper presented at the Changing Past in German Architecture Conference, Architectural Association.
- Derrida, Jacques (1992) 'Force of Law: The "Mystical Foundation of Authority"', pp. 3-67 in Drucilla Cornell et al. (eds.) *Deconstruction and the Possibility of Justice*. New York: Routledge.

- Dixon, Rosalind (2002) 'Rape as a Crime in International Humanitarian Law: Where to from Here?', *European Journal of International Law* 13(3): 697-720.
- Douzinas, Costas (2000) *The End of Human Rights: Critical Legal Thought at the End of the Century*. Oxford: Hart.
- Fink, Bruce (1995) *The Lacanian Subject: Between Language and Jouissance*. Princeton, NJ: Princeton University Press.
- Freud, Sigmund (1985) 'Why War?', pp. 343-362 in Albert Dickson (ed.), trans. James Strachey *Civilization, Society and Religion*. Harmondsworth: Penguin.
- Goodrich, Peter (1998) 'Social Science and the Displacement of Law', *Law and Society Review* 32(2): 473-492.
- Hesse, Carla and Robert Post (1999) 'Introduction', pp. 13-36 in Carla Hesse and Robert Post (eds.) *Human Rights in Political Transitions: Gettysburg to Bosnia*. New York: Zone.
- Ignatieff, Michael (1999) 'Human Rights', pp. 313-324 in Carla Hesse and Robert Post (eds.) *Human Rights in Political Transitions: Gettysburg to Bosnia*. New York: Zone.
- Kesic, Vesna (2002) 'Muslim Women, Croatian Women, Serbian Women, Albanian Women . . .', pp. 311-321 in Dusan Bjelic and Obrad Savic (eds.) *Balkan as Metaphor: Between Globalization and Fragmentation*. London and Cambridge, MA.: MIT Press.
- Lacan, Jacques (1953) *The Seminar of Jacques Lacan. Book I. Freud's Papers on Technique, 1953-1954*, trans. John Forrester, ed. Jacques-Alain Miller. New York and London: Norton, 1991.
- Lacan, Jacques (1964) *The Four Fundamental Concepts of Psycho-Analysis*, trans. A. Sheridan. London: Peregrine, 1986.
- Lacan, Jacques (1969) *Le Séminaire. Livre XVII. L'envers de la psychanalyse, 1969-1970*, ed. Jacques-Alain Miller. Paris: Seuil, 1991.
- Lacey, Nicola (1998) *Unspeakable Subjects: Feminist Essays in Social and Legal Theory*. Oxford: Hart.

- Laplanche, J.-B. and J. Pontalis (1973) *The Language of Psychoanalysis*. New York and London: Norton.
- Leigh, Monroe (1996) 'The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused', *American Journal of International Law* 90: 235-238.
- Leigh, Monroe (1997) 'Witness Anonymity is Inconsistent with Due Process', *American Journal of International Law* 91: 80-83.
- Meron, Theodor (2000) 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', *The American Journal of International Law* 94(1): 78-89.
- Morris, Virginia and Michael Sharf (1995) *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*. Volume 1. New York: Transnational Publishers.
- Neier, Aryeh (1999) 'Rethinking Truth, Justice and Guilt after Bosnia and Rwanda', pp. 39-52 in Carla Hesse and Robert Post (eds.) *Human Rights in Political Transitions: Gettysburg to Bosnia*. New York: Zone.
- Nikolic-Ristanovic, Vesna (2000) 'The Hague Tribunal and Rape in the Former Yugoslavia', pp. 79-83 in Vesna Nikolic-Ristanovic (ed.), trans. Borislav Radovic *Women, Violence and War: Wartime Victimization of Refugees in the Balkans*. Budapest: Central European University Press.
- Osiel, Mark (2000) *Mass Atrocity, Collective Memory, and the Law*. London and New Brunswick: Transaction.
- Ponte Del, Carla (2003) 'The Role of International Criminal Prosecutions in Reconstructing Divided Communities', public lecture presented at the London School of Economics.
- Rawls, John (1999) *A Theory of Justice*. Oxford: Oxford University Press.
- Reinhard, Kenneth (1999) 'Lacan and Monotheism: Psychoanalysis and the Traversal of Cultural Fantasy' *Jouvert* 3(2): 1-28.

Sands, Philippe (2003) 'After Pinochet: The Role of National Courts' pp. 68-108 in Philippe Sands (ed.) *From Nuremberg to the Hague: The Future of International Criminal Justice*. Cambridge: Cambridge University Press.

Stover, Eric and Harvey Weinstein (2004) 'Introduction: Conflict, Justice and Reclamation', pp. 1-26 in Eric Stover and Harvey Weinstein (eds.) *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press.

Zizek, Slavoj (2000) *The Fragile Absolute: or, Why is the Christian Legacy Worth Fighting For?* London: Verso.